

icc
Submission No. 232-2



Criminal Justice Division

02/2589

23 April 2002

Mr Paul McMahon
Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr McMahon

INQUIRY INTO STATUTE OF THE INTERNATIONAL CRIMINAL COURT

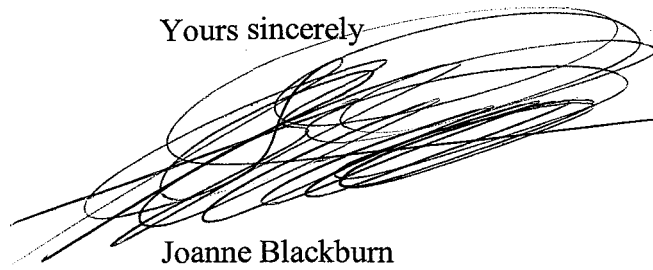
At the hearing before the Committee on 10 April 2002, witnesses from this Department took a number of questions on notice.

Please find enclosed the Department's answers to these questions.

The transcript indicates at page TR296 that Senator Ludwig asked about review of a decision made by the Attorney-General or a delegate under Division 4 of Part 3 of the International Criminal Court Bill. In fact, section 176 of the Bill does not permit the Attorney-General to delegate his or her powers under Part 3 of the Act.

Should anything further be required, please advise Geoff Skillen (phone 6250 6938; fax 6250 5457; Email geoff.skillen@ag.gov.au).

Yours sincerely



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**INQUIRY BY JOINT STANDING COMMITTEE ON TREATIES INTO THE
STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

HEARING ON 10 APRIL 2002

QUESTIONS TAKEN ON NOTICE

At page TR291 of the transcript, Senator Schacht and the Chair asked questions about the implementation of Article 27 of the ICC Statute in the draft Australian legislation.

Article 27 of the ICC Statute provides that the Statute applies to all persons, regardless of official capacity such as Head of State, member of Government or Parliament, elected representative or government official. The draft Bills do not repeat the provisions of article 27, because under customary international law an international tribunal may deal with a person alleged to have committed an international crime, regardless of the person's official capacity.

However, there are limitations on Australia's arrest and surrender of a person with official capacity to an international tribunal in certain circumstances. This is recognised in article 98.1 of the Statute, which provides that the Court may not proceed with a request for arrest and surrender which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of the person or property of a third State, unless the Court can first obtain a waiver of that immunity from the third State. Article 98.1 is reflected in clause 13 of the draft International Criminal Court Bill 2001.

In light of the discussion before the Committee, the Department will review the relevant provisions to determine whether they can more effectively express the position that official capacity affords no immunity from prosecution before the ICC and provide advice to the Attorney-General on options for change.

At page TR299, Senator Ludwig asked whether there is any offence in the International Criminal Court (Consequential Amendments) Bill that applies strict liability.

I confirm that there is no such provision in the Bill referred to the Committee. However, consideration is being given in the Department to the need to apply strict liability to knowledge of any of the Geneva Conventions, the Protocols to the Geneva Conventions, the International Covenant on Civil and Political Rights or the relevant Hague Declaration, where there is a reference to these instruments as an element of the offence. It would not be appropriate, for example, if the offence in clause 268.23 could be defeated by a claim that the perpetrator was ignorant of the existence of these instruments.

At page TR305 Mr Adams asked at what age are persons subject to the act.

At page TR325, evidence was given that article 26 of the ICC Statute restricts the jurisdiction of the ICC to persons over the age of 18, whereas the draft Australian legislation would be subject to the normal rules as to age for criminal responsibility. For the sake of completeness, I can advise that these rules are contained in sections 7.1 and 7.2 of the Criminal Code, which provide that a child under 10 years is not criminally responsible and a child between 10 and 14 years can only be criminally responsible if the child knows that his or her conduct is wrong. This is a question of fact, for which the prosecution bears the burden of proof.

At page TR306, Mr Wilkie asked why the definitions of rape in the proposed legislation are narrower than those in the draft Elements of Crimes developed by the Preparatory Committee.

The provisions in the draft legislation on rape, including those on consent, reflect the analogous provisions on 'unlawful sexual penetration' in section 71.8 of the Criminal Code, dealing with offences committed against United Nations and associated personnel.

The provisions in the draft legislation on rape could be reviewed to reflect the views put by Red Cross in a manner which would be consistent with Commonwealth criminal law policy.

Conduct identified in the Red Cross submission as potentially falling outside the scope of the current provisions on rape would fall within the provisions of the draft legislation on 'sexual violence' (see clauses 268.18, 268.63 and 268.86).

At page TR307, Mr Bartlett asked under what circumstances could decisions of the Pre-Trial Chamber of the International Criminal Court be made by a single judge.

Article 39.2(b)(iii) of the ICC Statute provides that the functions of the Pre-Trial Chamber shall be carried out either by 3 judges or by a single judge, in accordance with the Statute and the Rules of Procedure and Evidence.

Article 57.2(a) of the Statute provides that orders or rulings of the Pre-Trial Chamber under articles 15, 18, 19, 54.2, 61.7 and 72 must be concurred in by a majority of its judges. Article 57.2(b) provides that in all other cases, a single judge may exercise the functions of the Chamber unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Chamber.

Rule 7 of the Rules of Procedure and Evidence confirms that a single Judge may decide any matter that the Statute does not reserve for the full Chamber of the Pre-Trial Chamber (by article 57(2)(a)), but that the Pre-Trial Chamber may also decide that any functions of a single Judge are to be exercised by the full Chamber instead.

The other matters which are not reserved for decision by the full Chamber are under:

- article 53 (reviewing the decision of the Prosecutor, if the Prosecutor decides not to proceed with an investigation);
- article 56 (taking investigative measures where there is a unique opportunity);
- article 58 (issuing warrants and summons);
- article 59 (advising on and monitoring the interim release of an arrested person prior to surrender to the ICC);
- article 60 (ensuring that suspects have been informed of the charges and their rights, and deciding on interim release of arrested persons by the ICC pending trial); and
- article 64 (preliminary issues referred to the Pre-Trial Chamber by the Trial Chamber to ensure the effective and fair functioning of the trial).